IN THE

Supreme Court of the United States

October Term, 1974

No. 74-944

TIME, INC.,

Petitioner,

versus

MARY ALICE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

On December 15, 1967, Russell A. Firestone, Jr., was granted a divorce from Mary Alice Firestone. Mrs. Firestone had originally sought separate maintenance, but her husband counterclaimed "for divorce on grounds of extreme cruelty and adultery." In awarding the divorce to Russell Firestone, the divorce decree stated (Pl. Ex.2, A.525):

> ". . . It is the conclusion and the finding of the Court that neither party is domesticated. . . . In

> the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved. . . ."

The divorce decree also awarded alimony in the sum of $3,000.00 per month to Mrs. Firestone, plus custody of their minor child, and $740.00 per month child support (Pl. Ex.2, A.528).

Defendant Time, Inc., the publisher of the magazine "Time," printed on December 22, 1967, under the heading "Milestones" the following article:

> "Divorced. By Russell A. Firestone, Jr., 41 heir to the tire fortune; Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach school teacher; *on grounds of extreme cruelty and adultery;* after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, to 'make Dr. Freud's hair curl'." (emphasis added) (Pl. Ex.1, A.522)

Thereafter on January 19, 1968, Mrs. Firestone, through her attorney, demanded in writing a retraction of said article (A.139-141; Pl. Ex.11&12, A.539-542). Since Mrs. Firestone had been awarded alimony, she had not been found guilty of, nor had the divorce been granted on the ground of adultery (as stated in Time's article) for under the laws of Florida a wife found guilty of adultery could not be awarded alimony. §61.08 F.S. Notwithstanding, Time, Inc. declined to retract the article.

Mrs. Firestone then filed a libel suit against Time, Inc.

which defended asserting, among other things, the absence of actual malice. This cause came on for trial on July 13, 1970. The jury returned a verdict for Mrs. Firestone and against Time, Inc. in the amount of $100,000.00, and a Final Judgment was entered pursuant to the jury verdict on September 9, 1970 (A.575). Various appeals followed.

The facts upon which the jury returned the verdict reflect that Bill Doerner, who had been with Time Magazine approximately six months at the time the article was written, came into the office of Miss Ursula Nadasdy, a legal researcher for Time magazine, and showed to her an Associated Press wire pertaining to the Firestone divorce. The AP dispatch merely stated that Mrs. Firestone was "accused of" adultery (A.218, Def. Ex.1, A.543). Miss Nadasdy immediately called the "library" to obtain all folders pertaining to the Firestone (A.219-220). She promptly sent a query to Time, Inc.'s Miami bureau (A.219-220. Pl. Ex,6,A.534), specifically asking them to report "the grounds on which it (the divorce) was granted in the words of the Judge (A.202-203,215). She explained that the legal grounds for the divorce were necessary and that Time, Inc. would not just take the word of the Associated Press or any other source. It was up to their correspondents to get the exact grounds (A.214-219).

Miss Nadasdy did, in fact, receive precisely what she requested (Def. Ex.2, A.544). In quotation marks, the correspondents for Time, Inc. told the New York office the grounds for the divorce in the words of the Judge:

> "The Judge ruled. 'It is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.' "

The communications between Time's New York office and their Miami branch were rather fast and furious. Because this was a Saturday and the deadline for the publication of this magazine usually was 8:00 p.m., everyone was working against this deadline (A.206-7).

In addition to the AP dispatch and the dispatch from Time, Inc.'s Miami Bureau, neither of which stated Mrs. Firestone had been found guilty of adultery, Miss Nadasdy obtained a clipping of a New York newspaper which likewise stated that Mrs. Firestone had been "accused" of adultery (Def. Ex.3, A.545).

One of Time Inc.'s "stringers", Bob Delaney, was asked to check out the divorce. Neither Delaney nor any other Time employee ever once looked at the court file or read the divorce decree (A.258-9). However, based upon a telephone conversation with Mrs. Firestone's attorney in the divorce proceedings, Mr. Farish, Jr., Mr. Delaney advised Time, Inc. that the grounds for the divorce were extreme cruelty and adultery (Pl. Ex.4, A.101, 532). Mr. Farish, Jr., completely denied that he had ever told Mr. Delaney that. Farish, Jr., testified that Delaney had asked him what Mrs. Firestone was accused of, and Farish, Jr., had stated that Mr. Firestone had accused her of extreme cruelty and adultery. However, he had pointed out to Delaney that the Court had granted the divorce on the ground of lack of domesticity. He advised Delaney that Mrs. Firestone had not been found guilty of adultery (A. 133-137).

Delaney had also contacted Judge Knott, the trial judge who rendered the divorce decree. Judge Knott emphatically testified that he never told Delaney that Mrs. Firestone was found guilty of adultery (A.388-389). On proffer, he also

testified under oath that he did not in fact find Mary Alice Firestone guilty of adultery in his order (A.382).

Once all this information was obtained by Nadasdy, it was turned over to Doerner, the writer. He wrote the first draft of the article, later to be submitted to Mr. George G. Daniels, the Senior Editor, for final approval (Pl. Ex.9, A.537). Doerner admitted that both sources he used to write the first draft of the article mentioned that the presiding Judge doubted the testimony of extramarital affairs (A.321). Doerner had included a statement to that effect in his draft of the article, because he felt that it was important and certainly should be included in the article (A.321-323). However, in the final draft, the Senior Editor Daniels performed surgery on Doerner's work deleting that doubt (A.322) by omitting that statement, and all other references to "accused", "counterclaimed", or "alleged". At trial Doerner admitted that there was nothing that he had before him that had stated that the lower court had ruled that Mrs. Firestone was guilty of adultery (A.329-330). Notwithstanding, the final draft of the article (Pl. Ex.10, A.538) stated that the divorce was granted on the grounds of extreme cruelty and adultery (A.334), failed to mention a word about the Judge discounting much of the testimony as to extramarital activities and failed to mention anything about lack of domesticity, the ground given in the divorce decree as the ground for the divorce.

Finally, it was the duty of Miss Nadasdy to perform an accuracy check and to place over each word a line showing that it had, in fact, been checked and that it was accurate (A.197). She failed to check and mark the word "adultery", although the other words were so marked showing that

they had been checked out and that they were felt to be accurate(Pl. Ex.5, A.533). Mr. Daniels, the Senior Editor, admitted that Time required each word to be so marked and that Miss Nadasdy, the researcher, had failed to meet that requirement(A.299-300). He also admitted that although he had "thought" someone had checked the circuit court file and read the dirorce decree prior to publication (A.258-9), no one had done so.

QUESTIONS PRESENTED

I.

WHETHER THE SUPREME COURT OF FLORIDA IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO COX BROADCASTING AND GERTZ AND THUS CONTRARY TO THE FIRST AMENDMENT?

II.

WHETHER PETITIONER'S NEWS ITEM WAS A A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER PAPE AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION?

III.

WHETHER AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

IV.

WHETHER, UNDER HILL AND GERTZ, WITHDRAWAL OF A CLAIM FOR DAMAGE TO REPUTATION REQUIRES THAT AN "ACTUAL MALICE" TEST BE APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

ARGUMENT

I.

WHETHER THE SUPREME COURT OF FLORIDA IMPOSED LIABILITY WITHOUT FAULT CONTRARY TO COX BROADCASTING AND GERTZ AND THUS CONTRARY TO THE FIRST AMENDMENT?

a. *Whether Time, Inc. truthfully reported a judicial decision.*

Time, Inc. argues that the three dispatches and the newspaper article relied upon by it gave the same picture that their "Milestones" article gave (ie.), that the divorce was granted on the grounds of extreme cruelty and adultery. However, in those documents "accused of adultery" was the exact terminology used. None of those documents stated or implied that Mrs. Firestone was found guilty of adultery.

Alternatively, Time, Inc. argues that it truthfully published what the Firestone divorce decree disclosed. That is, that Firestone's counterclaim for divorce had been granted on grounds of extreme cruelty and adultery. This is clearly incorrect. While Firestone may have counterclaimed for divorce on the grounds of extreme cruelty and adultery, the divorce decree merely stated that Firestone's "counterclaim for divorce" was granted. It did not state upon *what* grounds it was granted. However, it was common knowledge that at that time a wife found guilty of adultery in Florida could not be awarded alimony. Hence, the divorce could only have been granted on the ground of extreme cruelty.

Time, Inc.'s argument that the divorce decree, which

merely stated that Firestone's counterclaim for divorce was granted without specifying the grounds, as a matter of law granted the divorce on all grounds. However, this argument carried to its logical extreme would mean that whenever a claim or counterclaim is granted without specifying upon what grounds, one would as a matter of law be allowed to assume that the claim or counterclaim was granted upon all grounds. However, we know that the most that one is allowed to assume is that the Judge found in favor of the claimant or counterclaimant on *one* of the many grounds alleged.

Time, Inc. also argues that if it had published the full text of the divorce decree, it would still be liable under the rationale of the Florida Supreme Court because the decree would have conveyed to the public exactly what their "Milestones" article did—that Mrs. Firestone had been divorced on the grounds of extreme cruelty and adultery. This clearly overlooks the fact that the jury found exactly to the contrary, finding that the "Milestones" article had a different effect on the mind of the reader than the divorce decree. As stated by the Florida Supreme Court in its second opinion (A.628):

> "We must also emphasize that the trial court specifically instructed the jury that,
>
> > 'I instruct you that there can be no recovery in this case if you find from the greater weight of the evidence that the article as published had no different effect than the divorce judgment in the case of Firestone v. Firestone, Case No. 64 C 2790C.'
>
> Therefore, to reach a verdict for petitioner, the jury must necessarily have determined that the article did have a different effect than the reading of the divorce judgment by the public. In McCormick v. Miami Herald Publishing Company, 139 So.2d 197 (Fla.App.2,1962) the court stated that a workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced. See also, Hammond v. The Times Publishing Co., 162 So.2d 681 (Fla. App.2,1964). Evidently, the jury determined sub judice that the article in question would have a different effect."

It seems that everyone, including the jury, the judge who authored the divorce decree, and the Florida Supreme Court, in *Firestone v. Firestone* (1972) 263 So.2d 223, and in the decision here appealed, all understood that:

> ". . . the divorce was not granted on grounds of adultery and there was no express finding in the final judgment of divorce that either of the parties was guilty of marital infidelity." (A.622)

It is only Time, Inc. that now finds difficulty with interpretation of a divorce decree that it never read before publishing to the nation that Mrs. Firestone was an adulteress. Time, Inc. did not truthfully report the divorce decree and the jury correctly so found.

b. *Whether there was error, fault or negligence on the part of Time, Inc.*

Time, Inc. argues that the four documents that it used to write its article gave the same picture as the Time, Inc. article, and the same picture as the divorce decree. This picture, argues Time, Inc., is that the divorce was founded both on extreme cruelty and adultery. However,

as shown, *supra*, and under Point II, *infra*, neither the four documents relied upon by Time, Inc. to write the article nor the divorce decree itself (which Time, Inc. never read) stated or implied that Mrs. Firestone was found guilty of adultery.

Time Inc. once again insists that it made no error in interpreting the divorce decree, but that the trial judge did what he was not supposed to do (i.e.), he found Mrs. Firestone guilty of adultery and also awarded her alimony. Such argument belies the evidence. Nowhere in the divorce decree does the judge find Mrs. Firestone guilty of adultery. Certainly one can only make that assumption at his own risk. Nonetheless, Time, Inc. continues to argue that the fact that the husband's counterclaim, which alleged both extreme cruelty and adultery, was granted in language that merely stated "defendant's counterclaim for divorce be and the same is hereby granted" without setting forth the grounds for granting the divorce "can only mean, in plain English, that it found for the husband on both extreme cruelty and adultery". Neither common sense nor legal construction can support such an argument, for the divorce could have been granted on *either* extreme cruelty *or* adultery *or* both. Even if we ignore the fact that Mrs. Firestone was awarded alimony and thus could *not* have been found guilty of adultery under Florida law, the mere fact that the Judge failed to state which of the grounds he granted the divorce on does not give Time, Inc., or anyone else, the license to assume it was granted on all grounds. Rather, the decree immediately puts one on notice that only the Judge knows which of the grounds he based the divorce upon. Printing an article that the divorce was granted on both grounds is not only negligent, but is in reckless disregard of the fact that we simply do not know which of the grounds support the divorce decree.

Time, Inc. argues that proper editorial procedure was used and that there was no evidence whatsoever of actual malice or negligence on its part. However, none of the sources of information that came to Time, Inc. indicated Mrs. Firestone was found guilty of adultery, except the statement from their stringer Delaney. Did this raise serious doubt in Time, Inc.'s eyes as to its truth or falsity? Evidently so. After the article was written, Miss Nadasdy was to perform an accuracy check and place over each word in the article a line showing that it had in fact been sufficiently checked and was accurate (A.178). Her failure to check and mark the word "adultery" is clearly evidence that there was serious doubt, at least in her mind, as to its accuracy or its truth or falsity. This certainly indicates serious doubt as to whether they had checked the word out sufficiently to go ahead and publish it as being an accurate statement. That doubt, in and of itself, clearly indicates that Time, Inc., while doubting whether a statement that Mrs. Firestone was found guilty of "adultery" was accurate, was guilty of reckless disregard in going ahead and publishing nationwide an article labeling Mrs. Firestone an adulteress, simply because it was expedient to do so in order to meet the deadline they were working against.

In an attempt to show that there was factual dispute for the jury to decide, Time, Inc. argues that there was no conflict between the testimony of Delaney and Farish, Jr. Delaney stated that the "technical grounds for the divorce according to Joseph Farish, Jr., attorney for Mary Alice Firestone, were given an extreme cruelty and adultery" (Pl.Ex.4,A.101,532). Time, Inc., argues that Farish stated the very same thing and quotes Farish's testimony to the effect " 'I said Mr. Firestone had accused her of extreme cruelty and adultery' (A.135) and agreed that he and De-

laney had discussed that 'the technical grounds for divorce *as alleged in the complaint* were adultery and extreme cruelty' (A.147)." Certainly these statements are not the "same", as Time, Inc. contends. The key words in Farish's testimony are, of course, "as alleged in the complaint". It can clearly be seen that Delaney stated that Farish had told him the divorce was granted on grounds of extreme cruelty and adultery (A355-356). However, Farish's testimony was that he and Delaney discussed the fact that the *allegations in the complaint* were adultery and extreme cruelty (A.147). Moreover, Farish specifically testified that he told Delaney that Mrs. Firestone had *not* been found guilty of adultery (A.133-137, 147). Their testimony could clearly not be more conflicting.

Time, Inc. next argues that even though there was a conflict in the testimony, Delaney's testimony was irrelevant since Time, Inc. is allowed to rely upon the information supplied to it by Delaney, its reporter in the field. However, this fact could clearly not preclude this case from going to the jury since Time, Inc. is not being made to account for any acts of negligence on the part of Delaney, which were imputed to Time, Inc. Rather, Time, Inc. is being held to account for its own independent acts of recklessness where the facts reveal that none of the documents that Time, Inc. claims it relied upon indicated or implied that Mrs. Firestone was found guilty of adultery, and where there was evidence to show that Time, Inc. even doubted the validity of Delaney's statement that Mrs. Firestone had been found guilty of adultery. Certainly the evidence reveals that Nadasdy doubled that the word "adultery" used in the article was accurate or sufficiently checked out since she had not placed the mark, required by Time, Inc., itself, to pe placed over every word in the article after it had been checked out and found to be accurate.

Time, Inc. attempts to equate the photographer in *Cantrel v. Forest City Publishing Co.* (1974) 95 S.Ct.465 to Delaney in this case. The fact that Delaney is a "stringer" and not a photographer is sufficient to distinguish the two. Moreover, Time, Inc. states that Cantrell held that since the photographer had not participated in the editorial process (i.e.), in writing or editing the Time article, his knowledge was not to be imputed to Time, Inc. That is *not* what *Cantrell* held. *Cantrell* held that there was insufficient evidence to support the jury verdict against the photographer since there was no evidence that he was in any way responsible for the inaccuracies and misstatements contained in the text of the articles written. In the present case, there is evidence that Delaney was in some way responsible for printing that Mrs. Firestone had been found guilty of adultery, when she had not been. However, none of this really makes any difference since Mrs. Firestone is not attempting to impute Delaney's acts to Time, Inc. It is the independent acts of negligence on the part of Time, Inc.'s staff members that constitutes publication with recklessness—the fact of publication when it was evident that Time, Inc.'s own employees seriously doubted its truth.

II.

WHETHER PETITIONER'S NEWS ITEM WAS A A RATIONAL INTERPRETATION OF AN AMBIGUOUS DOCUMENT UNDER *PAPE* AND THUS ENTITLED TO FIRST AMENDMENT PROTECTION?

The Florida Supreme Court's decision is not incompatible with *Time, Inc. v. Pape* (1971) 91 S.Ct.633, 401 U.S.282. It should first be noted that that case, which concerned a public official, is applicable to the present case only if it is found that the New York Times doctrine

is applicable, which it is not. It therefore follows that *Pape* is completely inapplicable.

At times Time, Inc. appears not to claim that it relied upon its interpretation of the language in the divorce decree as a basis for the article in question. It cannot do so, of course, because Time, Inc., prior to printing the article, failed to have any of its employees or agents secure a copy of the divorce decree and read it. Hence, there was no reliance by Time, Inc. upon any so-called ambiguous language in the decree. However, at other times, Time, Inc. attempts to confuse the issue by pointing to portions of the divorce decree as set out in its brief and arguing that since the decree granted the husband's counterclaim, without specifying upon what grounds, Time, Inc.'s interpretation that Mrs. Firestone had been found guilty of adultery was a rational one. It can only be once again stressed that Time, Inc. did not read or rely upon the divorce decree in writing its "Milestones" article. Hence, Time, Inc. cannot now be heard to argue backwards and rely upon any ambiguity it might "after the fact" find to exist in the divorce decree.

Time, Inc. tries to bring this case within *Time, Inc. v. Pape, supra*, by arguing that even though it never saw the divorce decree prior to printing the article in question and therefore cannot claim it relied upon any ambiguity in the decree itself), that it wrote the article in question based upon its interpretation of four documents: an AP dispatch (Def.Ex.1, A.99,543); two dispatches from its Miami office (Def. Ex.2, A.230,544; Pl.Ex.4, A.532); and a New York newspaper article (Def. Ex.3, A.545). It is these documents that Time, Inc. claims were misleading, and which allegedly led Time, Inc. to label Mrs. Firestone an adulteress. However, none of the documents state or

imply that Mrs. Firestone was found guilty of adultery. Certainly, there was nothing in those four documents to warrant a finding as a matter of law that Time, Inc. had adopted one of a number of possible rational interpretations of the documents. They are not ambiguous. They all state that Mrs. Firestone was "accused" of adultery. Time, Inc. merely went one step further and drew the further inference that she had been found guilty of adultery. However, that was not because of any ambiguity in the documents, but rather was because of Time, Inc.'s own recklessness.

Thus, Mrs. Firestone would submit that *as a matter of* law Time, Inc.'s interpretation of the three dispatches and the newspaper article it claims it relied upon was not a rational one. Certainly it can not be found that Time, Inc.'s interpretation of those three documents, which in no way stated or implied that Mrs. Firestone was found guilty of adultery, was rational. This case is clearly distinguishable from *Pape* in that regard. In *Pape*, reasonable men could not differ as to whether Time, Inc.'s interpretation of the Civil Rights Commission Report was rational. In the present case, however, reasonable men can not differ as to whether Time, Inc.'s interpretation was *not* rational.

III.

WHETHER AN "ACTUAL MALICE" TEST SHOULD HAVE BEEN APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

a. *Whether the "actual malice" test should apply to reports of judicial proceedings?*

Time, Inc. argues that the New York Times doctrine should apply to reporting judicial proceedings. It is argued

that this is suggested in the concurring opinion of Justice White in *Rosenbloom v. Metromedia* (1971) 91 S.Ct. 1811. However, it is clear that Justice White was not even speaking of reports of judicial proceedings, but was expressing his opinion that discussion of the conduct of public officials cannot be subjected to artificial limitations designed to protect private individuals involved in an episode with officials from unfavorable publicity. His holding was specifically stated as:

> "I would accordingly hold that in defamation actions, absent actual malice as defined in New York Times Co. v. Sullivan, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the privacy of an individual involved in or affected by the official action be spared from public view. . . ."

Time, Inc. next argues that the New York Times doctrine was extended to reports of judicial proceedings in *Cox Broadcasting Corp. v. Cohn* (1975) 95 Sup.Ct.1029 and thus proof of "actual malice" is required. This is clearly not so. *Cox* merely held that the First and Fourteenth Amendments would not allow the state to expose the press to liability for truthfully publishing information released to the public in official court records. There is clearly no statement implying that "actual malice" is required to be shown.

Even if reckless disregard or "actual malice" is the appropriate standard, the evidence clearly reveals that Time, Inc. was guilty of reckless disregard or malice in publishing that Mrs. Firestone was found guilty of adultery where their employee, Miss Nadasdy, failed to make the

accuracy check in regard to the word "adultery", a check which Time, Inc. itself required to be performed. Daniels, the senior editor, freely admitted that Miss Nadasdy had failed to meet that requirement. Nonetheless, the article was published by Time, Inc. without checking further because it had to make the publication deadline. Certainly the evidence reveals that Miss Nadasdy felt that, even in light of the dispatch from Delaney she had insufficient information and/or insufficient sources to allow her to conclude that the word "adultery" was accurate. Publishing the article in spite of this doubt as to its accuracy was reckless.

b. *Whether the "actual malice" test applies because Respondent was a public figure?*

A review of the caselaw indicates that Mrs. Firestone was not a "public figure". Because the designation of a person as a "public figure" results in a decrease of the protection against defamation and invasions of privacy, such designations should not be made lightly. Legal rules providing for such a designation should afford the most complete protection of an individual's privacy consistent with the purposes of the First Amendment.

The categorization of a person as a "public figure" is bottomed upon the fact that the person has "voluntarily placed himself in the public spotlight". *Gertz v. Robert Welch, Inc.* (1974) 94 S.Ct.2997 further defines "public figures at page 3008 as:

> "Those who, by reason of the notoriety of their achievements or the vigor and success with which they *seek the public's attention*, are properly classed as public figures. . . ." (emphasis added)

In regard to both "public officials" and "public figures" Gertz states at 3009:

> "More important than the likelihood that private

individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in Garrison v. Louisiana, 379 U.S.64,77 (1964), the public's interest extends to 'anything that might touch on an official's fitness for office. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.'

Those classed as *public figures* stand in a similar position, Hypothetically, it may be possible for someone to become a public figure through no *purposeful action of his own*, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have *thrust themselves to the forefront of particular public controversies* in order to influence the resolution of the issues involved. In either event, they *invite attention and comment.*

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have *voluntarily exposed*

> *themselves to increased risk of injury from defamatory falsehoods* concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an 'influential role in ordering society.' Curtis Publishing Co. v. Butts, supra, 388 U.S. at 164 (opinion of Warren, C.J.). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

As can be seen, a "public official" seeks public office and hence voluntarily exposes himself to the increased risk of injury from defamation. It is likewise with a "public figure" who through purposeful action of his own assumes a "influential role in ordering society" by occupying a position of persuasive power and influence or by thrusting himself to the forefront of particular public controversies. The one common denominator in these "public persons" is voluntary exposition of themselves to the increased risk of injury from defamation.

In the present case, Mrs. Firestone engaged in no purposeful action of her own which thrust her to the forefront of a particular public controversy. She clearly did not voluntarily expose herself to an increased risk of injury from defamation. Mrs. Firestone was the wife of a wealthy man and nothing more. If Mrs. Firestone and the Firestone divorce were written about in the newspapers it was only because the newspapers took it upon themselves to delve into her private life and publicize it to the world.

Time, Inc. argues that Mrs. Firestone's divorce was

a public controversy and that the mere fact that she was a party to the divorce action made her a public figure. This is only a round about way of essentially arguing that Mrs. Firestone's divorce was a matter of public interest under *Rosenbloom v. Metromedia, supra. Rosenbloom* held that the New York Times doctrine extended to private persons if the statement concerned matters of general or public interest. However, *Gertz* has now limited or modified *Rosenbloom* to the extent that it no longer applies to private individuals. *Gertz* makes it clear that private individuals do not become public figure subject to damaging falsehoods concerning their lives without recourse when they are suddenly thrust into the news. When chance and the news media bring a private citizen into the public eye, the right to redress for defamation is not diminished so long as their notoriety was not of their own choosing. The right to recover damages for the dissimination of untruths about themselves without proving actual malice by the dissimenator is retained. The requirement of proof of malice under the New York Times doctrine does not extend to private individuals who have not risen to public renown by their own activity.[1]

Essentially Time, Inc. argues that anyone filing for separate maintenance (as in this case) or divorce becomes a public figure because the *divorce* is a public controversy. Again, that argument is *Rosenbloom* all over again. Under *Gertz*, filing for a divorce can not make a person a public figure, unless the person already is a public figure in his own right. In other words, the divorce of a

[1] Contrary to Time, Inc.'s contention, there was never any argument in either of the Florida appellate courts that Mrs. Firestone was a public figure. Time, Inc.'s only argument was that Mrs. Firestone's divorce was a matter of public interest under Rosenbloom. Time, Inc. is now changing horses midstream because, of course, *Gertz* no longer sanctions that argument.

person who is a public figure may be written about and the courts can not be called upon for redress of injury inflicted by defamatory falsehood without proof of malice. However, a private person does not become a public figure merely because he files for divorce. Hence, that person does not have to prove malice in a defamation action arising out of an article written about the person and his divorce.

Time, Inc. refers to a number of newspaper articles written about Mrs. Firestone's divorce in an attempt to show that Mrs. Firestone was a "public figure". However, the fact that newspapers chose to write about Mrs. Firestone's divorce in no way means that she is a "public figure". Under *Gertz*, the news media can not make a private individual who is seeking a divorce a "public figure" merely by writing about him.

In a weak attempt to show that Mrs. Firestone was a public figure, Time, Inc. quotes the following language from one of the Florida Supreme Court decisions:

> "Sadly, however, their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable cause celebre in social circles across the country. Additionally, as the District Court observed:
>
> > 'The divorce trial . . . lasted seventeen months and . . . [d]ue to the social position of the participants and the sensational, colorful testimony at the trial, there was national news coverage.
> >
> > The Associated Press flashed news of the de-

> cree within hours of its issuance. The Miami Herald and the New York Daily News ran articles the next day. They, among other national newspapers, had been following the trial from its inception in their news columns. . . .' "

Again, Time, Inc. is attempting to argue that the fact that the newspapers chose to publicize Mrs. Firestone's divorce to the world made her a "public figure". However, it is clear under *Gertz* that Mrs. Firestone can not be *made* a "public figure" by the newspapers because of publications of her divorce, where she was not a "public figure" of her own right, which she clearly was not. There is absolutely nothing in the record to support a conclusion that Mrs. Firestone was a public figure in her own right. She was merely a housewife who had the misfortune of being married to a wealthy man. Mrs. Firestone was even found to be a private individual by the Fifth Circuit in another suit by Mrs. Firestone against Time, Inc. for publication of an article relating to the Firestone marital difficulties and electronic eaves dropping employed in connection with the divorce action. *Firestone v. Time, Inc.* (1972) 460 F.2d 712 at page 718.

Time, Inc. chose to write about a private individual, the wife of a wealthy man. They falsely publicized to the nation that she was an adulteress. Under *Gertz*, she is not required to prove that the publication was with malice or reckless disregard.

IV.

WHETHER, UNDER *HILL* AND *GERTZ*, WITHDRAWAL OF A CLAIM FOR DAMAGE TO REPUTATION REQUIRES THAT AN "ACTUAL MALICE" TEST BE APPLIED AND THE ACTION DISMISSED ON THE FIRST AMENDMENT GROUNDS?

Time, Inc. contends that application of *Gertz*, *supra*, to the present case required proof of actual malice since Mrs. Firestone did not claim, as an element of damages, damage to reputation. It is Time, Inc.'s contention that the state interest referred to in *Gertz* is an interest in protecting reputation and that since Mrs. Firestone did not seek a claim for damages to reputation, there was no state interest to protect and thus actual malice had to be proved. *Gertz* simply and plainly does not stand for that proposition. The legitimate state interest underlying the law of libel referred to in *Gertz* is "the compensation of individuals for the harm inflicted on them by defamatory falsehoods". *Gertz* p.17. This compensation by way of a damage award, can be proved by a private individual by showing actual damages, rather than presumed damages. *Gertz* pp.25-26. The rationale is that a state has no substantial interest in securing for a plaintiff "gratuitous awards of money damages far in excess of any actual injury." As stated in *Gertz* p.26:

> "We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehoods include impairment of reputation and standing in the community, personal humiliation, and mental

> anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

In light of *Gertz*, the Florida Supreme Court stated in the present case (A.627-628):

> "Sub judice, the trial judge properly instructed the jury that if libel is proven by the greater weight of the evidence *which caused actual damages* to the plaintiff, they should award plaintiff an amount of money that will fairly and adequately compensate her for such damages, and instructed that *'It is only damages which are a direct and natural result of the alleged libel* which may be recovered. If you find the plaintiff is entitled to recover damages, you may consider any shame, mortification, mental anguish, or hurt feelings experienced in the past or to be experienced in the future, if any, which you find from the evidence. There is no exact standard for fixing the compensation to be awarded on account of such damages. Any such award should be fair and just in light of the evidence.' The jury heard the testimony and considered the evidence before it, and the factors enumerated in the instruction of the trial judge which are the same as those set out by the Supreme Court of the United States in Gertz, supra, and upon the evidence decided that a just and fair award for the damages suffered by petitioner would be $100,000. This award is supported by competent evidence concerning the injury. As aforestated, the Supreme Court of the United States in Gertz, supra, recognized that there need be no evidence which assigns an actual dollar value to the injury."

It can be seen that in the present case, the jury was instructed on actual, rather than presumed, damages in accordance with *Gertz*.

It is next argued that "actual malice" was required in *Time, Inc. v. Hill* (1967) 87 S.Ct.534, which was an invasion of privacy suit, and that the present case is essentially the same as *Hill* since Mrs. Firestone's claim for damage to reputation was withdrawn. While *Hill* applied the New York Times doctrine to invasion of privacy suits and thus adopted a standard of malice or reckless disregard, this was before *Gertz, supra*. As stated by Justice Powell in footnote #2 of his concurring opinion in *Cox Broadcasting, supra, Gertz* has called into question the conceptual basis of the *Hill* case, since under *Gertz* a state may now constitutionally apply a more relaxed standard of liability in a "false light" invasion of privacy case where a private individual is involved.

It can be seen that neither *Hill* nor *Gertz* require proof of malice if there is not a claim for damage to reputation. In the present case, there was a claim for mental pain and suffering, shame, mortification and hurt feelings and that was sufficient.

CONCLUSION

Based upon the foregoing, the judgment in favor of Mrs. Firestone should be affirmed. However, even if error were to be found in any of the foregoing points, the most that would be required is a new trial. There is certainly no basis for entry of a judgment in favor of Time, Inc., as it so urges.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Harold R. Medina, Jr., One Chase Manhattan Plaza, New York, New York, 10005, by mail, this 13th day of June, 1975.

By .....
ROBERT M. MONTGOMERY, JR.
and
EDNA L. CARUSO